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UNITED STATES DISTRICT COURT

CENTRAL DISTRICT OF CALIFORNIA

JP HYAN, an individual, Plaintiff, v. LIBERTY SURPLUS INSURANCE CORPORATION, a corporation; ROSSLYN (BETH) HUMMER, ESQ., an individual; ERIC C. PETERSON, ESQ., an individual, and RUTTER HOBBS & DAVIDOFF INCORPORATED, a corporation, Defendants.	Case No. 2:14-cv-2004-GAF (FFMx) DEFENDANT ROSSLYN STEVENS HUMMER'S NOTICE OF MOTION AND MOTION TO STRIKE PLAINTIFF'S FIRST AMENDED COMPLAINT AS A SLAPP SUIT; MEMORANDUM OF POINTS AND AUTHORITIES Date: June 23, 2014 Time: 9:30 a.m. Courtroom: 740

TO THE UNITED STATES DISTRICT COURT AND TO ALL PARTIES AND THEIR ATTORNEYS OF RECORD:

PLEASE TAKE NOTICE that on June 23, 2014, at 9:30 a.m. in Courtroom 740 of the above-entitled Court, located at 255 East Temple Street, Los Angeles, California 90012, Defendant Rosslyn Stevens Hummer will move, and hereby does move, for an order to strike Plaintiff JP Hyan's First Amended Complaint as a Strategic Lawsuit Against Public Participation under California's Anti-SLAPP statute Code of Civil

Procedure Section 425.16, as enforced in state court and in federal courts in the Ninth Circuit.

This motion is made following the conference of counsel pursuant to L.R. 7-3 which took place on May 2, 2014. The conference of counsel was followed up on by correspondence between counsel on May 2, 12, 16 and 21, 2014.

This motion is made on the grounds that Plaintiff Hyan's claims against Defendants seek to burden Mrs. Hummer's exercise of her rights to petition the courts for redress, including her participation in Superior Court litigation in which she is a defendant and other litigation in this United States District Court in which she is a defendant and cross-claimant.

This motion is based on this notice; the attached memorandum of points and authorities; the concurrently filed Declaration of Laurence L. Hummer and Exhibits thereto and (proposed) order; the pleadings, files and records in this action; and on such other and further argument as may be presented at the hearing of this motion.

Dated: May 22, 2014

LAURENCE L. HUMMER,
A LAW CORPORATION

By: s/Laurence L. Hummer
Laurence L. Hummer
Attorney for Defendant
ROSSLYN STEVENS HUMMER

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MEMORANDUM OF POINTS AND AUTHORITIES

I. INTRODUCTION

All of Plaintiff JP Hyan's ("Mr. Hyan's") allegations against Defendant Rosslyn Stevens Hummer, named in the First Amended Complaint in this diversity action as Rosslyn (Beth) Hummer ("Mrs. Hummer"), arise from her participation in litigation.

As an associate attorney working with other lawyers at Defendant Rutter Hobbs & Davidoff Incorporated, Mrs. Hummer handled litigation with other attorneys there. Mrs. Hummer and others were named as defendants in claims alleging conversion of evicted persons' property, malpractice (brought by Mr. Hyan, a former client), and malicious prosecution. In 2011, Mrs. Hummer was named as a defendant in an insurance interpleader action in this Court and brought her own cross-claim for indemnity against her former employer.

Mrs. Hummer rightfully has asserted her claims to indemnity, as an insured from insurance companies, and as an employee from her former employer. To save its own skin, the law firm repeatedly has acted against the interests of Mrs. Hummer and another former employee, Eric Peterson. The law firm did not notify the law firm's professional liability insurers of the conversion claims which the law firm's managers knew had been made against Mrs. Hummer by litigation adversaries. Later, the law firm settled claims against it by Mr. Hyan by agreeing to use its "best" efforts to attempt to deprive Mrs. Hummer and Mr. Peterson of insurance coverage. Their primary policy was issued by Defendant Liberty Surplus Insurance ("Liberty"), and the excess policy was issued by Executive Risk Surplus Lines Insurance Corporation ("ERSIC").

Mrs. Hummer fought back. She requested defense and indemnity from the law firm and Defendant Liberty. She notified her former employer that she would pursue litigation against it in response to its refusal to defend and indemnify her. Her counsel convinced Liberty to reverse its decision denying her coverage based on her former employer's failure to give notice.

Mrs. Hummer properly petitioned this Court, in filing her answer and cross-claim in ERSIC's Interpleader Action filed in 2011, asserting her rights to insurance defense and indemnity, bringing a cross-claim against her former employer for indemnity, and answering the law firm's own cross-claim. Mrs. Hummer rightfully opposed Rutter Hobbs & Davidoff's and JP Hyan's coordinated motions in the Interpleader Action to have ERSIC pay all the insurance money to Mr. Hyan and have Mr. Hyan intervene in the Interpleader Action.

Mr. Hyan's First Amended Complaint tries to make torts out of the legal positions of his litigation adversaries, including Mrs. Hummer. Mr. Hyan alleges that they "caused" Liberty and ERSIC not to pay all the insurance money to him, and they "threatened" Rutter Hobbs & Davidoff so that the law firm failed to use its "best" efforts to convince this Court to order the insurance money paid to Mr. Hyan.

Mr. Hyan's complaint is a Strategic Lawsuit Against Public Participation, a SLAPP suit. He seeks to invade privileged communications between insureds and the insurance companies providing them with defense in litigation. The First Amended Complaint should be dismissed without leave to amend and with prejudice. Thereafter, briefing should be scheduled for Mrs. Hummer's motion to recover attorneys' fees and costs under California's Anti-SLAPP law.

II. MR. HYAN'S COMPLAINT IS A SLAPP SUIT

A. Mr. Hyan's Complaint Tries to Make Torts out of Protected Activity.

This memorandum first addresses Mr. Hyan's allegations and then discusses evidence submitted outside his pleading, by way of the concurrently-filed Declaration of Laurence L. Hummer.

Hyan acknowledges that Mrs. Hummer is an attorney who formerly was employed by Rutter Hobbs & Davidoff Incorporated, named by Mr. Hyan as defendants in a Superior Court action he filed in 2010. FAC, paras. 9 through 11 (Doc. 16) and Ex. A thereto, his amended complaint in the Superior Court (Doc. 16-1, at p. 1, lines 12 and 16 to 18; p. 3, lines 14 to 19). Mr. Hyan alleged therein that, in 1997, two attorneys at the law firm committed malpractice in drafting a contract for him. Ex. A, Doc. 16-1, paras. 15 to 20. Mr. Hyan also alleged that ten years later in 2007, after the other party to the contract stopped making payments to him, the same attorneys who previously had helped write the contract recommended that suit be brought, that Mrs. Hummer worked on the case, and that the attorneys told him that he had a good case. In fact, he alleges, he should have been told not to sue, because the law firm had committed malpractice ten years earlier in preparing the contract. Ex. A, Doc. 16-1, para. 23.

Mr. Hyan alleges in his First Amended Complaint herein that his malpractice claims were covered by Liberty's $5 million primary professional liability policy and ERSIC's $5 million excess policy. FAC, Doc. 16, paras. 13 and 14. His state court malpractice claims were bifurcated for trial in two phases. The claims of contract drafting malpractice in 1997 were set for jury trial, while his claims arising out of the litigation in 2007 were set for later arbitration. FAC, Doc. 16, para. 15. On June 2, 2011, during the jury trial over the contract drafting claims, Mr. Hyan made a settlement demand for the policy limits of both policies, which the law firm accepted but that Mrs. Hummer and co-Defendant Eric Peterson rejected. FAC, Doc. 16, para. 17.

B. Mr. Hyan and Rutter Hobbs & Davidoff Agreed to Take Away Mrs. Hummer's Insurance Coverage.

Facing its insured's conflicting positions, ERSIC filed its Interpleader Action in this Court on June 7, 2011. Mr. Hyan's motion to intervene was denied, a decision affirmed by the Ninth Circuit on March 19, 2014. FAC, Doc. 16, para. 18. Mr. Hyan claims that ERSIC said it would have paid Mr. Hyan but for the objections of Mrs. Hummer and Mr. Peterson. FAC, Doc. 16, para. 19.

Mr. Hyan alleges that the Superior Court jury issued a $10,155,559.00 verdict in his favor on the contract drafting claims on June 15, 2011. On March 6, 2012, Rutter Hobbs & Davidoff Incorporated consented to entry of judgment against it for $7,500,000.00, of which $5,250,000.00 was to come by the law firm using its "best" efforts to get the money for Mr. Hyan from the insurance policies. FAC, Doc. 16, paras.

20 to 23. Mr. Hyan and the law firm stipulated to a Superior Court consent judgment. FAC, Doc. 16, paras. 24 to 26. Liberty and ERSIC still refuse to pay him even though Rutter Hobbs & Davidoff Incorporated has "directed" Liberty to do so. FAC, Doc. 16, para. 27.

C. Mr. Hyan Ignores Express Provisions of the Insurance Policy.

Mr. Hyan acknowledges that Mrs. Hummer and Mr. Peterson had been sued in Superior Court lawsuits arising out of their employment at Rutter Hobbs & Davidoff Incorporated. One case, Mr. Hyan asserts, involves accusations against them of conversion, stealing guns and other property, upon entry onto real property in 2008 with Sheriff's deputies during an eviction ("the Conversion Action"). In another action claiming malicious prosecution, the California Court of Appeal recently affirmed a decision of the Superior Court in Mrs. Hummer and Mr. Peterson's favor ("the Malicious Prosecution Action"). FAC, Doc. 16, para. 28.

In paragraph 16, Mr. Hyan concludes that Mrs. Hummer and Mr. Peterson have no right to insurance coverage because they supposedly are accused of intentional torts. FAC, Doc. 16, para. 29. Exhibit B to the First Amended Complaint, he alleges, is the Liberty insurance policy. Provisions in the policy actually contradict Mr. Hyan's assertions and establish Mrs. Hummer's and Mr. Peterson's priority rights to insurance defense coverage. For example, Exhibit B, at page 56 (as marked in the lower right-hand corner), says in part.

> "B. Consent to Settle, Defense: The Company shall defend any claim against any Insured including the appeal thereof seeking damages to which this insurance applies even if any of the allegations of the suit are groundless, false, or fraudulent, provided, however, the Company shall have neither the right nor the duty to defend any disciplinary proceeding."

It also says at page 63,

> "IV. Exclusions
>
> A. This policy does not apply:

1. to any judgment or final adjudication based upon or arising out of any dishonest, deliberately fraudulent, criminal, malicious or deliberately wrongful acts or omissions committed by any Insured, however, the Company will defend allegations of the foregoing acts or omissions until the time that the act or omission is factually proven;"

And it further says at page 67,

"E. Payment and Apportionment of Claim Expenses: All claim expenses shall first be subtracted from the applicable limit of liability with the remainder, if any, being the amount available to pay damages." [Emphasis added.]

Mr. Hyan claims that Mrs. Hummer and Mr. Peterson approved of the settlement of a claim of malpractice against other lawyers at Rutter Hobbs & Davidoff. FAC, Doc. 16, para. 30. He rehashes his motion to intervene in the Interpleader Action, this Court's denial of that motion, and the Court of Appeal's affirmance in paragraph 31.

D. Mr. Hyan Claims that Mrs. Hummer Tortiously Caused Rutter Hobbs & Davidoff, Her Former Employer and Current Litigation Adversary, to Breach its Settlement With Him.

Mr. Hyan notes that Rutter Hobbs & Davidoff did not appeal this Court's denial of its motion requesting that all the interpleaded funds be paid to Mr. Hyan. FAC, Doc. 16, para. 32. Rutter Hobbs & Davidoff did not oppose Mrs. Hummer's and Mr. Peterson's motions to stay the ERSIC action, and Rutter Hobbs & Davidoff Incorporated did not appeal that motion either. FAC, Doc. 16, paras. 33 to 37. The law firm has failed to block Liberty from providing a defense to Mrs. Hummer and Mr. Peterson in the Conversion and Malicious Prosecution Actions. FAC, Doc. 16, paras. 38 to 40.

Liberty refuses to pay him Mr. Hyan. FAC, Doc. 16, Para. 41. He says that Defendants know that their legal positions are wrong, but still induced breach of the Liberty and ERSIC insurance policies, which are being depleted by defense costs. FAC, Doc. 16, paras. 42 to 44.

E. Mr. Hyan Claims Defendants Refused to Relinquish Insurance Coverage.

Based on his general allegations, Mr. Hyan concocts several claims. His First and Second Claims both assert that he can sue Liberty under Insurance Code Section 11580 as the holder of a judgment for property damage and bodily injury. His Third Claim for Relief claims Liberty tortuously failed to recognize his supposed "contract" rights. FAC, Doc. 16, para. 64.

Mr. Hyan's Fourth Claim for Relief alleges that Mrs. Hummer and Mr. Peterson induced Liberty to breach its supposed "contract" with Mr. Hyan. In paragraph 69, he pleads that Defendants Hummer and Peterson are aware of an insurance company's duties. He pleads that they are aware of his judgment against Rutter Hobbs & Davidoff, and that they are aware of Mr. Hyan's third party beneficiary rights. He asserts that they are aware that Mr. Hyan's own legal contentions are correct. He says that Mrs. Hummer and Mr. Peterson, intending to interfere with Mr. Hyan's supposed rights, "instructed" Liberty to not fund a reasonable settlement and not pay a judgment. FAC, Doc. 16, paras. 70 to 73.

Mrs. Hummer and Mr. Peterson caused Liberty to breach its supposed duties to Mr. Hyan and caused him emotional distress, for which they should be held liable in exemplary damages. FAC, Doc. 16, paras. 75 to 77.

Mr. Hyan repackages his general allegations against Liberty, Mrs. Hummer and Mr. Peterson as a Fifth Claim for declaratory relief. FAC, Doc. 16, paras. 78 to 81.

F. Mr. Hyan Claims That Rutter Hobbs & Davidoff Has Not Used its "Best" Efforts Against Mrs. Hummer and Mr. Peterson.

Mr. Hyan's Sixth Claim is against Rutter Hobbs & Davidoff for not using its "best efforts" to get him the insurance money. FAC, Doc. 16, paras. 82 to 87. Mr. Hyan repackages these contentions as a tort claim seeking punitive damages in his Seventh Claim for Relief. FAC, Doc. 16, paras. 89 through 95.

G. Mr. Hyan Claims that Mrs. Hummer, Mr. Peterson and Liberty Caused Rutter Hobbs & Davidoff to Breach Their Settlement Agreement.

Mr. Hyan's Eighth Claim for Relief alleges that Mrs. Hummer and Mr. Peterson joined with Liberty to induce Rutter Hobbs & Davidoff to breach its settlement agreement with Mr. Hyan and not use its "best" efforts to help Mr. Hyan take away Mrs. Hummer's and Mr. Peterson's insurance coverage. Supposedly, Mrs. Hummer and the other two Defendants are aware of the "material terms" of the confidential settlement agreement, which Mr. Hyan asserts conferred "benefit" on Mrs. Hummer and Mr. Peterson. He says that they "profited" from his release of his claims. FAC, Doc. 16, paras. 98 to 99.

He says that they "caused" the law firm to breach "by failing to turnover (sic) the remainder of the Liberty Policy to Mr. Hyan," intending to prevent or delay or make the law firm's performance more difficult. FAC, Doc. 16, para. 102. How? By "objecting to payment and actively engaging in litigation to prevent Liberty and ERSIC from doing so." FAC, Doc. 16, para. 103. Mr. Hyan obviously refers to Mrs. Hummer's and Mr. Peterson's pleadings and opposition in the Interpleader Action. Mrs. Hummer and Mr. Peterson "countermanded" Rutter Hobbs & Davidoff Incorporated's directions to Liberty and subjected Liberty to multiple claims against the policy, thus causing Mr. Hyan harm. FAC, Doc. 16, paras. 104 to 107.

H. The Evidence Demonstrates the Futility of Mr. Hyan's Complaint.

Mrs. Hummer submits evidence in support of her Anti-SLAPP motion through the Declaration of Laurence L. Hummer ("L. Hummer Dec.") and exhibits thereto which are submitted concurrently. On February 8, 2010, upon learning that Rutter Hobbs & Davidoff had not tendered the Conversion Action to the professional liability carrier for defense, Laurence Hummer did so as Mrs. Hummer's attorney. He also appeared in Court on her behalf. L. Hummer Dec., para. 2, at p. 1, line 27 to p. 2, line 20. Mrs. Hummer had been employed as an associate attorney by Rutter Hobbs & Davidoff for more than two years until she left in the fall of 2009. The firm's shareholders included (among others) Marshall Rutter, Frank Hobbs, Brian L. Davidoff, the Managing Director and member of its Executive Committee, and Geoffrey L. Gold, a litigator and then-Chair of the law firm's Litigation Department. L. Hummer Dec., para. 3, at p. 2, line 21 to p. 3, line 4. Laurence Hummer has knowledge of the litigations because he has represented Mrs. Hummer and has maintained contact with her insurance-appointed lawyers Baker Keener & Nahra and Mitchell Mulbarger and James Hepworth at that firm, who have kept him informed and with whom he has consulted about the litigations. L. Hummer Dec., para .4, p. 3, lines 5 to 16.

Mr. Hyan filed the Malpractice Action in state court just days after Allan Gelbard and Lisa Du Boise initiated the Conversion Action against Mrs. Hummer and others. Mr. Hyan sought in excess of $20 million in damages for asserted malpractice in contract drafting and litigation. Prior to filing suit, Mr. Hyan's attorneys requested copies of the law firm's files and sent a settlement demand to the law firm which Mr. Davidoff forwarded to Mrs. Hummer. L. Hummer Dec., para. 5, p. 3, line 17, to p. 4, line 8.

Another Superior Court lawsuit is the Malicious Prosecution Action of Lisa Du Boise, filed on March 8, 2011, against Rutter Hobbs & Davidoff client Rodney Unger, the firm and its lawyers including Mrs. Hummer, and others, regarding a lawsuit against Ms. Du Boise in federal court that was not successful for Mr. Unger. L. Hummer Dec., para. 6, p. 4, lines 9 to 18.

ERSIC filed the Interpleader Action in this Court in June 2011. The Court denied JP Hyan's motion to intervene and Rutter Hobbs & Davidoff's motion to have all $5 million of ERSIC's insurance money paid to Mr. Hyan. A copy of this Court's September 12, 2012, order is Exhibit 1 to the Hummer Declaration. The Interpleader Action lawsuit has since been stayed. L. Hummer Dec., para. 7, p. 4, line 19 to p. 5, line 5.

Mr. Gelbard's and Ms. Du Boise's complaint in the Conversion Action was served on Mrs. Hummer on January 20, 2010. When Brian Davidoff did not notify the insurance carrier, Laurence Hummer gave notice and requested indemnity from Rutter

Hobbs & Davidoff on behalf of Mrs. Hummer. L. Hummer Dec., paras. 8 and 9, p. 5, lines 6 to 24. Mrs. Hummer's retained defense counsel wrote to Brian Davidoff regarding Mrs. Hummer's indemnity request on February 26, 2010, and Mr. Davidoff denied the request for indemnity in a letter dated March 5, 2010. L. Hummer Dec., para. 10, p. 5 line 25 to p. 6 line 6. These pieces of correspondence and many others submitted with Laurence Hummer's Declaration were previously submitted to this Court in the Interpleader Action.

Liberty turned down Mrs. Hummer's claim on March 3, 2010, on the grounds that the insurer should have been given notice back in December 2008, when the plaintiffs in that action claimed in a Superior Court filing that they had filed a complaint against Mrs. Hummer with the State Bar of California. Liberty took this position even though the State Bar found no merit in the adversaries' complaint that Mrs. Hummer had taken their property in the course of handling an eviction, and Mrs. Hummer's employer including the Chair of the Litigation Department Geoffrey Gold had supervised the matter and had known about the claims of supposed conversion back in 2008. L. Hummer Dec., paras. 12 and 13, p. 6 line 7 to p. 7, line 13 and Exhibits 5 (Liberty's denial email), 6 (State Bar correspondence), 27 (excerpts from Mr. Gelbard's and Ms. Du Boise's Superior Court filing in December 2008 and Rutter Hobbs & Davidoff's billings).

Liberty denied Mrs. Hummer's claim even though she was an employee of the law firm, and Mr. Davidoff had refused to report the claim when a lawsuit was filed. Accordingly, Mrs. Hummer's counsel wrote to Mr. Davidoff on March 31, 2010, again requesting indemnity, advising that Mrs. Hummer was incurring expense and would hire counsel, and informing the law firm of its obligation to preserve documents for use in litigation against it. L. Hummer Dec., para. 14, at p. 7, lines 11 to 19 and Exhibit 7 (letter to Mr. Davidoff).

After Mrs. Hummer retained a lawyer to deal with Liberty, Liberty changed its position and appointed Baker Keener & Nahra to defend Mrs. Hummer, and Mrs. Hummer's attorney requested reimbursement from Rutter Hobbs & Davidoff, but reimbursement was not made. L. Hummer Dec., para. 15, lines 20 to 27 and Exhibit 8 (counsel's April 21, 2010, letter to Brian Davidoff).

Thereafter, in the Malpractice Action, Mr. Hyan's lawyers made settlement demands. One such demand, dated December 30, 2010, is Exhibit 9. L. Hummer Dec., para. 16, p. 8, lines 1 to 4. The Superior Court ordered Mr. Hyan's claims of malpractice in drafting the contract in 1997 to jury trial, with the claims of litigation malpractice deferred to later arbitration. On June 2, 2011, Mr. Hyan's counsel sent another settlement demand, this time seeking all the remaining insurance proceeds of both the Liberty and ERSIC policies. L. Hummer Dec., para. 17, p. 8, lines 5 to 12. Mrs. Hummer's defense counsel wrote a letter the next day to Liberty, Rutter Hobbs & Davidoff's and ERSIC's (Chubb's) attorneys, objecting to a settlement that would exhaust the policies and leave Mrs. Hummer uninsured, and reminding Mr. Davidoff of the law firm's indemnity obligations regarding its former employee. L. Hummer Dec., para. 18, p. 8, lines 13 to 16 and Exhibit 11. Mr. Davidoff replied the next day, advising that if Mrs. Hummer did not agree to the settlement, then the law firm would seek indemnity from her. L. Hummer Dec., para. 19, p. 8, lines 17 to 20, and Exhibit 12.

JP Hyan learned in the summer of 2011 about the clash between Rutter Hobbs & Davidoff and Mrs. Hummer over the insurance. On July 5, 2011, Mr. Hyan's lawyer Don Howarth wrote to Mrs. Hummer's lawyer Mitchell Mulbarger saying he had just received a copy of ERSIC's complaint in the Interpleader Action, and thereby had learned of the disagreement. Apparently referring to his June 2, 2011, settlement demand, Mr. Howarth wrote to Mr. Mulbarger that Rutter Hobbs & Davidoff had told him that if a policy limit were made, all the defendants would "instruct" the insurance carrier to pay it and that making that demand would "open up the policy as the carrier would be in bad faith not to pay the demand." On July 18, 2011, Mr. Howarth again wrote to Mr. Mulbarger about settlement. L. Hummer Dec., para. 20, p. 8, lines 21 to 26 and Exhibits 13 and 14.

The pleadings in this Court were put at issue. ERSIC filed its First Amended Complaint in the Interpleader Action, Exhibit 15, on July 7, 2011. Mrs. Hummer's answer and cross-claim against Rutter Hobbs & Davidoff was filed on September 27, 2011. L. Hummer Dec., para. 22 and Exhibit 16. She admitted in her pleading that Rutter Hobbs & Davidoff had a disagreement with her and Eric Peterson over the use of ERSIC's insurance proceeds to pay Mr. Hyan, that ERSIC would have been in bad faith if it accepted the demand and eliminated Mrs. Hummer's and Mr. Peterson's insurance coverage, and that the insureds agreed to make a lesser offer using insurance proceeds which Mr. Hyan declined. Exhibit 16, paragraphs 37 to 42. Rutter Hobbs & Davidoff answered, counter-claimed against ERSIC and cross-claimed against Mrs. Hummer and others on December 20, 2011. L. Hummer Dec., para. 23, p. 9, lines 4 to 7 and Exhibit 17.

JP Hyan pleads in his First Amended Complaint that his secret March 2012 settlement with Rutter Hobbs & Davidoff includes release of personal injury claims, giving that as a basis for standing under Insurance Code Section 11580. On the contrary, three months before he reached agreement with the law firm, Mr. Hyan voluntarily dismissed in the Superior Court all claims against Mrs. Hummer and other parties who had not been involved in the jury trial in the Malpractice Action, and all claims against the parties who had been involved in the jury trial that had not been decided by the jury verdict. L. Hummer Dec., para. 24, p. 9, lines 8 to 18 and Exhibit 18 (Superior Court Minutes, December 13, 2011). He later settled with and dismissed Geoffrey Gold as a defendant. L. Hummer Dec., para. 25, p. 9, lines 19 to 21 and Exhibit 19 thereto (notice of ruling and dismissal). When they filed their stipulation for a consent judgment in the Superior Court on March 9, 2012, Mr. Hyan and Rutter Hobbs & Davidoff recited that "the Arbitration has been dismissed with prejudice, without any findings of liability of any party." L. Hummer Dec., para. 26, p. 9, line 22 to p. 10, line 14, and Exhibit 20 (notice of entry of ruling with stipulation, judgment, dismissal of Frank Hobbs and Superior Court minutes) (see Exhibit pages 151, 155, and 156 at lines 7 to 13). They also agreed that the terms of their confidential settlement would prevail over any inconsistent terms in the judgment itself. See Exhibit page 156 at line 28 to Exhibit page 157 line 2. Only those claims decided by the jury verdict remained to be later settled on March 9, 2012, and that jury verdict included no personal injury damages. L. Hummer Dec., para. 27, p. 10, lines 15 to 22 and Exhibit 21 at Exhibits pages 184 to 186.

Mr. Hyan contends that the Conversion Action involves only claims of intentional tort that cannot be indemnified by insurance. In fact, conversion is a strict liability tort. A request for indemnification in that action sent to Mrs. Hummer's attorney refers to "vicarious liability." L. Hummer Dec., para. 28, p. 10 line 23 to p. 11 line 3 and Exhibit 22.

The underlying cases are still proceeding. L. Hummer Dec., paras. 29 through 32, p. 11, lines 4 through 25. Mrs. Hummer and the other attorneys succeeded with motions to strike in the Malicious Prosecution Action, but motions are pending on August 21, 2014, for attorneys' fees and the remainder of the case is set for trial on July 13, 2015. L. Hummer Dec., para. 30 and Exhibit 24. The Conversion Action is set for trial on June 15, 2015, with a demurrer to the Seventh Amended Complaint set to be heard on September 17, 2014. Decision is pending from the California Court of Appeal after the hearing held on May 14, 2014, of Mrs. Hummer's appeal of the trial court's denial of her Anti-SLAPP motion in that action.

III. ARGUMENT – THE COMPLAINT IS A SLAPP SUIT

A. Mrs. Hummer's Evidence Shows That Mr. Hyan's Complaint Should Be Stricken as a Strategic Lawsuit Against Public Participation.

Mrs. Hummer has made a prima facie showing above that Mr. Hyan's First Amended Complaint seeks to penalize her for exercising her rights of petition and free speech. Mr. Hyan's objective is to cut off Mrs. Hummer's access to insurance defense funds necessary for her to defend herself in Superior Court litigation arising out of her employment by her faithless former employer, Rutter Hobbs & Davidoff.

Although Mr. Hyan has made sure to keep the settlement document from Mrs. Hummer's eyes, what Mr. Hyan himself says about the settlement shows that he joined with Rutter Hobbs & Davidoff to pursue the common objective of appropriating for himself all the insurance proceeds. Mr. Hyan obviously knew that he and Rutter Hobbs & Davidoff were committing themselves to take actions that would hurt Mrs. Hummer's and Mr. Peterson's insurance interests.

Mr. Hyan already had learned, months before he settled with Rutter Hobbs & Davidoff in March 2012, that Mrs. Hummer had not been privy to Rutter Hobbs & Davidoff's efforts in June 2011 to "open up" the Liberty and ERSIC insurance coverage through a policy demand, that Rutter Hobbs & Davidoff's attorneys did not speak for Mrs. Hummer in discussing settlement with Mr. Hyan's attorneys, and that she and Mr. Peterson had objected to the prospect of being left without insurance coverage through Rutter Hobbs & Davidoff's machinations. In other words, Mr. Hyan had every reason to know that he was going into a full-blown dispute with Mrs. Hummer and Mr. Peterson when he settled with Rutter Hobbs & Davidoff. He wanted the law firm's "best" efforts to help him proceed against Mrs. Hummer and Mr. Peterson in this Court.

Mrs. Hummer has a fundamental right to petition. She had, and continues to have, the right to insist on her rights as an insured under the Liberty and ERSIC policies to a defense of the Malpractice, Conversion and Malicious Prosecution Actions. She had, and continues to have a right, and obligation as described below, to communicate with the insurers providing her defense. She had and continues to have a right to insist that Rutter Hobbs & Davidoff be responsible for its indemnity obligations as her employer, as alleged in her cross-claim in the Interpleader Action and to oppose her former employer's attempts to impose cost and expense upon her.

Mrs. Hummer has made the required "initial prima facie showing" under California's Anti-SLAPP statute that Mr. Hyan's "suit arises from an act in furtherance of [Mrs. Hummer's] right of petition of free speech." Dealertrack, Inc. v. Huber, 460 F. Supp. 2d 1177, 1180 (C.D. Cal. 2006). Since she has met that burden, the burden shifts to Plaintiff to prove that he will probably prevail on his claims. Code Civ. Proc. §425.16(b)(1); see also Blanchard v. DirectTV, Inc., 123 Cal. App. 4th 903, 912-13 (2004). Mr. Hyan cannot meet his burden.

"In deciding the question of potential merit, the trial court considers the pleadings and evidentiary submissions of both the plaintiff and the defendant[.]" Rohde v. Wolf, 154 Cal. App. 4th 28, 37 (2007). Although a court is not meant to weigh credibility or "comparative probative strength of competing evidence, it should grant the motion if, as a matter of law, the defendant's evidence supporting the motion defeats the plaintiff's attempt to establish evidentiary support for the claim." Id. (citation omitted). The trial court's evaluation of the merits of the lawsuit uses a "summary-judgment-like procedure." Varian Medical Systems, Inc. v. Delfino, 35 Cal. 4th 180, 192 (2005). The Court is empowered to consider evidence outside the pleadings and matters of which it may take judicial notice in deciding an Anti-SLAPP Motion to Strike.

Mrs. Hummer discusses further below how Mr. Hyan's allegations run afoul of Mrs. Hummer's litigation privilege under the Civil Code and the Noerr-Pennington Doctrine, her right to communicate confidentially with the insurance carriers, her rights to pursue her own contractual right to the insurance coverage and her right to pursue her claims against Rutter Hobbs & Davidoff. Mrs. Hummer also points out that Mr. Hyan is attempting to relitigate issues this Court already has decided when he moved to intervene in the Interpleader Action in 2012.

B. Mrs. Hummer's Purported Conduct Is Privileged Under Civil Code Section 47, the Noerr-Pennington Doctrine and the Attorney-Client Communication Privilege She Shares with the Insurance Carriers.

"No one is permitted to allege that what was rightly done in a judicial proceeding was done with malice." Gosewisch v. Doran, 161 Cal. 511, 514 (1911). Yet Mr. Hyan alleges that he was harmed by Mrs. Hummer's assertion of her rights to professional liability insurance policies during the pendency of the Interpleader Action, Mr. Hyan's Malpractice Action and other actions involving Mrs. Hummer.

In Silberg v. Anderson, 50 Cal. 3d 205 (1990), the California Supreme Court established a four-part test to determine if a communication falls within the ambit of California's litigation privilege, as codified at Civil Code section 47. To be privileged, the communication must be (i) made in a judicial or quasi-judicial proceeding; (ii) by litigants; (iii) to achieve the objects of the litigation; and (iv) have some connection or logical relation to the action. Silberg, 50 Cal. 3d at 212. Mr. Hyan complains of communications made by Mrs. Hummer to her insurance carrier during the pendency of litigation about how the carrier should proceed with policy funds. Such communications are absolutely privileged under Civil Code section 47(b).

"The litigation privilege under [Civil Code S]ection 47 is an absolute privilege [that] bars all tort causes of action except a claim of malicious prosecution." JSJ Limited Partnership v. Mehrban, 205 Cal. App. 4th 1512, 1522 (2012) (citing Flatley v. Mauro, 39 Cal. 4th 299, 322 (2006). Other actions by Mrs. Hummer related to her communicative acts with Liberty are likewise privileged. "[W]here the cause of action is based on a communicative act, the litigation privilege extends to those non communicative actions which are necessarily related to that communicative act." Rusheen v. Cohen, 37 Cal. 4th 1048, 1052 (2006). Communications to third parties related to the litigation come within the privilege. Sharper Image Corp. v. Target Corp., 425 F. Supp. 2d 1056, 1077 (N.D. Cal. 2006).

The Noerr-Pennington Doctrine provides immunity for their communications to those who petition the government, including through the initiation of a lawsuit. The Ninth Circuit has held that "[t]he Noerr-Pennington doctrine stands for a generic rule of statutory construction, applicable to any statutory interpretation that could implicate the rights protected by the Petition Clause." Sosa v. DirecTV, Inc., 437 F.3d 923, 931 (9th Cir., 2006).

No matter how hard Mr. Hyan tries to style his claims that Mrs. Hummer "caused" breaches of the "contracts" by the insurer or Rutter Hobbs & Davidoff by "threatening" them if they did not accept her legal position, "the law of this circuit establishes that communications between private parties are sufficiently within the protection of the Petition Clause to trigger the Noerr-Pennington doctrine, so long as they are sufficiently related to petitioning activity." Sosa, 437 F.3d at 935. The Sosa court also pointed out that California protects pre-litigation communications under Civil Code Section 47. 437 F. 3d at 936.

Furthermore, Mrs. Hummer, her appointed attorney and her insurance carrier, Liberty, have a common interest and share a tripartite attorney-client communication privilege. "Insured, carrier, and attorney, together form an entity—the defense team—arising from the obligations to defend and to cooperate, imposed by contract and professional duty. This entity may be conceived as comprising a unitary whole with intramural relationships and reciprocal obligations and duties each to the other quite separate and apart from the extramural relations with third parties or with the world at large. Together, the team occupies one side of the litigating arena." Bank of America v. Superior Court, 212 Cal.App.4th 1076, 1090-1091 (2013), review denied (quoting American Mutual Liability Insurance Co. v. Superior Court, 38 Cal.App.3d 579, 591–592 (1974). Mr. Hyan is not part of the intramural team; he is the litigation adversary, with no right to complain of any purported communications between Mrs. Hummer and Liberty.

C. The Fourth Claim for Relief Fails Because A Party to A Contract Cannot Be Sued for Inducing Breach of that Contract and Mr. Hyan is Not a Third Party Beneficiary of that Contract.

The tort of intentional interference with contract "requires (i) a contractual relationship between a plaintiff and a third party, (ii) defendant's knowledge of the contract, (iii) defendant's intent to disrupt performance of the contract, and (iv) conduct by defendant preventing performance of the contract." Powerhouse Motorsports Group, Inc. v. Yamaha Motor Corporation, U.S.A., 221 Cal. App. 4^{th} 867, 883 (2013) (citations omitted). Twenty years ago, the California Supreme Court held that a party cannot interfere with his own contract. Applied Equipment Corp. v. Litton Saudi Arabia, Ltd., 7 Cal. 4th 503, 507, 514 (1994).

Mrs. Hummer is an insured under the Liberty contract of insurance, and cannot be sued for interfering with her own contract. And, Mr. Hyan is not a party to the contract. Mr. Hyan's claim to a direct right of action against Liberty need not be accepted as true because it represents a conclusion of law. Ashcroft v. Iqbal, 556 U.S. 662, 678 (2009). A "third party claimant cannot bring an action upon a duty owed to the insured by the insurer." J.C. Penney Cas. Ins. Co. v. M.K., 52 Cal.3d 1009, 1018 (1991) (quoting Clemner v. Hartford Ins. Co., 22 Cal. 3d 865, 889 (1978)). Only an insured or an assignee of an insured can sue an insurer for breach of contract in California. Royal Indemn. Co. v. United Enterprises, Inc., 162 Cal. App. 4th 194, 205 (2008). Mr. Hyan claims he is an exception to this rule because he is a third party beneficiary.

Whether a third party is a beneficiary of a contract hinges on the intent of the parties, as manifested by the terms of the contract. Hess v. Ford Motor Co., 27 Cal. 4th 516, 117 Cal. Rptr. 2d 220, 226 (2002) ("[a]scertaining this intent is a question of ordinary contract interpretation" which "is to be ascertained from the writing alone, if possible.") (citation omitted). Mr. Hyan pleads no facts, only conclusions, that he is a third party beneficiary.

D. Mr. Hyan is Collaterally Estopped to Argue That He Is a Beneficiary Under the Liberty Policy.

One exception to the general rule that a third party claimant cannot bring an action upon a duty owed to the insured by the insurer is for a judgment creditor who "may enforce the terms which flow to its benefit pursuant to Insurance Code section 11580." Harper v. Wausau Ins. Co., 56 Cal. App. 4th 1079, 56 Cal. Rptr. 2d 64, 68 (1997). Insurance Code section 11580(b)(2) only provides the opportunity to enforce a policy directly to those who have secured a judgment "in an action based upon bodily injury, death, or property damage[.]"

Mr. Hyan obtained no such judgment. He had already dismissed with prejudice his claims for personal injury prior to entering into a settlement agreement with Rutter Hobbs & Davidoff.

Furthermore, his claim that money damages are "property" damages was rejected when he made the same argument in the Interpleader Action. See L. Hummer Dec., Exh. 1, at Exhibits page 12. "When an issue of fact or law is actually litigated and determined by a valid and final judgment, and the determination is essential to the judgment, the determination is conclusive in a subsequent action between the parties[.]" Eilrich v. Remas, 839 F.2d 630, 632 (9th Cir. 1988) (quoting the Restatement (Second) of Judgments, sec. 27 (1982)). Collateral estoppel "applies to a question, issue, or fact when four conditions are met: (1) the issue at stake was identical in both proceedings; (2) the issue was actually litigated and decided in the prior proceedings; (3) there was a full and fair opportunity to litigate the issue; and (4) the issue was necessary to decide the merits." 672 F.3d 800, 807 (citing Montana v. United States, 440 U.S. 147, 153-54 (1979) and Clark v. Bear Stearns & Co., Inc., 966 F.2d 1318, 1320 (9th Cir. 1992)). All those factors apply to Mr. Hyan's argument about the ERSIC policy in the Interpleader Action. Mr. Hyan is collaterally estopped to argue that Section 11580 applies in this new action he has brought about the Liberty policy.

E. The Eighth Claim for Relief For Inducing Rutter Hobbs & Davidoff's Breach of the Secret Settlement Similarly Fails.

Mr. Hyan claims that Mrs. Hummer, along with Liberty and Mr. Peterson, induced Rutter Hobbs & Davidoff to breach its agreement to use its "best" efforts to take away Mrs. Hummer's and Mr. Peterson's insurance coverage from ERSIC and Liberty itself. ERSIC's funds by March 2012 already were the subject of the Interpleader Action in this federal court. He believes he can make this allegation notwithstanding this Court's ruling against his motion to intervene and Rutter Hobbs & Davidoff's motion to pay him all the ERSIC money. L. Hummer Dec., Exh. 1.

Mr. Hyan does not allege how Mrs. Hummer supposedly brought home to Rutter Hobbs & Davidoff that it has been trampling on her rights and would be held accountable at law. Certainly, the law firm was told more than once in Mrs. Hummer's attorney's demand letters that communications were to go through counsel. See the last paragraph of Exhibit 2, at Exhibits page 21 and the last paragraph of Exhibit 7 at Exhibits page 37. Mrs. Hummer's attorney has asserted Mrs. Hummer's contentions in the Interpleader Action. Mrs. Hummer is privileged under Civil Code Section 47, Applied Equipment, and the Noerr-Pennington Doctrine to stand up for her rights, and the Eighth Claim for Relief should be stricken.

Plaintiff's claims to punitive damages must likewise fail. "In the absence of an independent tort, punitive damages may not be awarded for breach of contract 'even where the defendant's conduct in breaching the contract was willful, fraudulent, or malicious.'" Applied Equipment, 7 Cal. 4th at 516 (citing Myers Building Industries, Ltd. v. Interface Technology, Inc., 13 Cal. App. 4th 949, 959 (1993)).

F. The Fifth Claim for Declaratory Relief Also Fails.

A dismissal of underlying substantive claims upon which a declaratory relief claim depends justifies dismissal of the declaratory relief claim as well. Shroyer v New Cingular Wireless Services, Inc., 622 F.3d 1035, 1044 (9th Cir. 2010). Under the Declaratory Judgment Act, this Court has discretion to retain or dismiss a declaratory relief claim. 28 U.S.C. § 2201; see, e.g., Wilton v. Seven Falls Co., 515 U.S. 277, 279 (1995); Government Employees Ins. Co. v. Dizol, 108 F.3d 999, 1004 (9th Cir. 1997); and Polido v. State Farm Mut. Auto. Ins. Co., 110 F.3d 1418, 1422 (9th Cir. 1997). As long ago as 1942, the Supreme Court made clear that while a Court may exercise its jurisdiction to hear a declaratory relief claim, it is under no compulsion to so do. Brillhart v. Excess Ins. Co. of America, 316 U.S. 491, 494 (1942).

Since all of Mr. Hyan's purported "rights" and "interests" in the Liberty policy arise out of his faulty legal conclusion that he is a third party beneficiary to Liberty policy, no "actual controversy" exists necessitating declaratory relief. Indeed, California courts reject declaratory relief in just this situation. See, e.g., Otay Land Co. v. Royal Indemn. Co., 169 Cal. App. 4th 556, 563 (2008). As discussed above, Mr. Hyan is a stranger to the Liberty policy and cannot enforce it against anyone. Given these facts, this Court should refrain from exercising declaratory relief jurisdiction.

G. Mrs. Hummer Is Entitled to Recover Attorneys' Fees and Costs.

Pursuant to Code of Civil Procedure section 425.16(c)(1), a prevailing defendant is entitled to recover her attorney's fees and costs. Mrs. Hummer requests the Court to set a briefing schedule for her motion to recover fees and costs in making this motion.

IV. CONCLUSION

Mr. Hyan's First Amended Complaint seeks to penalize Mrs. Hummer for asserting her rights. She cannot be sued because she has refused to cave in to Mr. Hyan's settlement demands and Rutter Hobbs & Davidoff's efforts to "break open" the insurance policies at her expense. She cannot be sued because she prevailed in this Court and in the Ninth Circuit over Mr. Hyan and Rutter Hobbs & Davidoff's coordinated motions asking for leave to intervene and for all the insurance defense money to go to Mr. Hyan. There is no possibility of Mr. Hyan being able to amend his First Amended Complaint to assert proper claims.

Mrs. Hummer's motion to dismiss should be granted without leave to amend. A briefing schedule should be set for her motion for fees and costs under the Anti-SLAPP statute.

Dated: May 22, 2014

LAURENCE L. HUMMER,
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